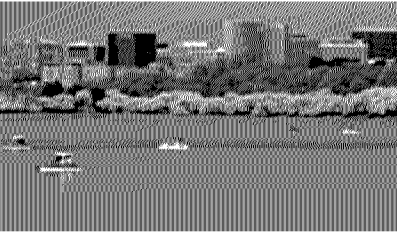


From: Mary Grady/DC/USEPA/US
Sent: 1/9/2012 8:56:08 AM

To: Steven Neugeboren/DC/USEPA/US@EPA
CC:
BCC: Mindy Kairis/DC/USEPA/US
Subject: Water Law News for January 9, 2012



WATER LAW NEWS
JANUARY 9, 2012

BNA, Inc.

Daily Environment

REPORT

HIGHLIGHTS

Chesapeake Bay
EPA Says New Plans for Bay Restoration Should Make Up for Previous Weak' Efforts
ANNAPOLIS, Md. Final plans being developed by the states for reducing pollution in the Chesapeake Bay during the next five years will need to make up for shortcomings in their plans covering the first phase of the cleanup, an Environmental...

Chesapeake Bay
Manure-to-Energy Seen as Boon for Water Quality
Widespread use of excess farm animal manure to generate power in the Chesapeake Bay watershed would substantially improve water quality, increase farm income, and generate electricity for the region, according to a report released Jan....

Mining
Salazar Near Decision on Grand Canyon Protection
Interior Secretary Ken Salazar "will make an announcement regarding conservation of the Grand Canyon" Jan. 9, according to the Interior Department. The department's Jan. 6 media advisory did not explain the detail of the coming...

North Carolina
Environment Agency Sees Challenges From Population Growth, Tight Budget
RALEIGH, N.C. North Carolina has seen significant improvement in its air and water quality, despite a large population increase, according to a reportreleased by the state Department of Environment and Natural Resources Jan. 6....

Water Pollution
EPA Submits Permit for Construction Sites Minus Turbidity Limits for Stormwater Runoff
A final general permit for stormwater discharges from construction that does not include turbidity limits has been submitted for White House review by the Environmental Protection Agency....

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Cities Weigh Changes To Decrees Under EPA's New 'Integrated' Water Plan
Wastewater utilities are assessing the legal and practical requirements for successfully amending the terms of existing consent decrees in light of EPA's recent integrated permitting initiative, with experts saying the agency is likely to agree to modifications that rely on green infrastructure, increase stormwater capacity and result in significant savings.

Municipalities Seek To Test EPA's New Integrated Water Planning Approach
Several cities, including Kansas City, KS, and Baltimore, are volunteering to serve as pilots for EPA's integrated planning framework, which is aimed at letting municipalities and wastewater treatment utilities prioritize their mandatory water pollution control efforts in order to be more cost-effective.

Activists Back Permits Over Enforcement For EPA's Municipal Water Plan
Environmentalists are tentatively backing EPA's pursuit of a more permit-oriented pollution control strategy instead of relying primarily on enforcement, saying the agency's use of permits with long-term control plans in a forthcoming integrated permitting framework is significantly more transparent and invites more public participation than using consent decrees.

Activists Point To Case Data To Back EPA Stance In High Court CWA Suit
Environmental groups are urging the Supreme Court to consider evidence not currently in the record that could bolster EPA's argument in a pending case that the Clean Water Act (CWA) does not intend for courts to review pre-enforcement decisions, such as issuance of administrative compliance orders.

Latest Blogs

High Court Gears Up For Sackett
As the Supreme Court is poised to hear oral arguments in a key case on whether courts can review pre-enforcement challenges to Clean Water Act...



SUPREME COURT:
Big business backs David against EPA's Goliath in wetlands fight

Lawrence Hurley, E&E reporter

Published: Friday, January 6, 2012 http://adserver.eenews.net/www/delivery/ck.php?oaparams=2_bannerid=1228_zoneid=87_source=spotlight_cb=887c21d91a_oadest=http://winter.narucmeetings.org/

When the Supreme Court hears oral arguments next week in a case about an Idaho couple's fight against U.S. EPA over whether they needed a wetlands

permit to build their dream home, it appears at first blush to be a classic David versus Goliath battle.

Mike and Chantell Sackett, from Priest Lake, Idaho, are the underdogs in that scenario, fighting an uphill battle against Washington bureaucrats over whether they have the right to contest in court EPA's order preventing them from constructing their house without a Clean Water Act permit (*Greenwire*, Sept. 19, 2011).

But the Sacketts have a powerful ally of their own: big business.

Leading the charge is the U.S. Chamber of Commerce, the most powerful business lobby. Also weighing in are the National Association of Homebuilders, National Association of Manufacturers and American Petroleum Institute.

Each has filed amicus briefs with the court, which will hear arguments in *Sackett v. EPA* on Monday.

The Sacketts say they did not need a permit and have a right under the due process clause of the Fifth Amendment to contest the order. EPA has threatened to impose severe fines if the Sacketts do not comply.

The business community shares the Sacketts' concerns. Just before the Supreme Court agreed to hear the case last summer, General Electric Co. had filed a petition raising similar questions in the context of a Superfund case, but the justices declined to take it. Even then, court-watchers were curious as to why the court chose one case over the other (*Greenwire*, July 11, 2011).

In its brief, the U.S. Chamber called the case "especially important" to its members because of EPA's "longstanding pattern and practice of circumventing traditional enforcement mechanisms."

In an interview, Robin Conrad, who heads the U.S. Chamber's National Chamber Litigation Center, said EPA treats businesses exactly the same way as people like the Sacketts.

"The same heavy-handedness that EPA has applied to the Sacketts has been applied countless times to businesses big and small," she added. That is across the board, not just in the context of wetlands disputes, Conrad said.

Even companies that seek clarification from EPA about wetlands jurisdictions can suddenly find themselves hit with a compliance order, she added.

Tom Ward, an attorney for the National Association of Homebuilders, said in an interview that while it might be reasonable to conclude that big developers can navigate the regulatory process more easily than individual landowners like the Sacketts, most of the group's members are not as savvy.

"They are not as sophisticated as everyone thinks they are," Ward added. "Our members end up in very similar situations to the Sacketts.

In fact, most of the association's members build fewer than 10 houses a year, Ward said.

The situation is not helped by the fact that EPA has never -- regardless of whether Republicans or Democrats control the White House -- been open to the idea of people challenging wetlands determinations in court. If it had, there would be case law that would help the courts navigate the issue, Ward added.

Regulatory muddle

Wetlands jurisdiction is notoriously confusing, in part thanks to the Supreme Court, which issued a fractured ruling in a 2006 case, *Rapanos v. U.S.*, that failed to offer lower courts conclusive guidance (*Greenwire*, Feb. 7, 2011).

As to the wider issue of EPA's use of its compliance authority, General Electric's lawyer, prominent advocate Kathleen Sullivan of the Quinn Emanuel Urquhart & Sullivan firm, has also filed a brief backing the Sacketts, reiterating the arguments the company made last year in the Superfund case about the need for a court hearing to challenge EPA's administrative orders that are issued concerning contamination cleanups.

Like the Clean Water Act, the Superfund law -- officially known as the Comprehensive Environmental Response, Compensation and Liability Act -- does not allow for a "timely and meaningful hearing either prior to or ... immediately after the issuance of an administrative order depriving the recipient of property," the GE brief states.

The Sackett case is a "valuable opportunity for the Court to provide constitutional guidance regarding the fundamental due process principles governing environmental regulatory schemes that authorize agencies to issue unilateral administrative orders," Sullivan wrote.

The U.S. Chamber's Conrad remains bemused as to why the court chose the Idaho case over GE but conceded that "maybe the Sacketts facts look more sympathetic to more justices."

As for EPA, Solicitor General Donald Verrilli addressed the issues raised by the business community in his latest brief when noting that compliance orders "fall within the broad range of communications that agencies use to inform regulated parties of governing legal requirements and existing violations."

Allowing for immediate court review, pre-enforcement "would ultimately disserve the interests of both the government and regulated parties, by discouraging interactive processes that can obviate the need for judicial action," he wrote.

The administration's concerns are shared by Nina Mendelson, a law professor at the University of Michigan Law School, who worries about a situation where deep-pocketed companies "may be able to bog EPA down" in the courts.

"The more costly and cumbersome every enforcement effort is, the fewer violations EPA can pursue," Mendelson said.

Furthermore, existing environmental problems could get worse before they can be addressed because companies would be challenging the orders in court instead of resolving the underlying problem, Mendelson added.

CHESAPEAKE BAY: EPA starts assessing restoration's costs, benefits

Paul Quinlan, E&E reporter

Published: Friday, January 6, 2012 [http://adserver.eenews.net/www/delivery/ck.php?oaparams=2_bannerid=1231_zoneid=87_source=click to_cb=c386241feb_oadest=http://www.nationalelectricityforum.org/](http://adserver.eenews.net/www/delivery/ck.php?oaparams=2_bannerid=1231_zoneid=87_source=click_to_cb=c386241feb_oadest=http://www.nationalelectricityforum.org/)

U.S. EPA is conducting a sweeping cost-benefit analysis of its controversial Chesapeake Bay restoration initiative to satisfy critics in Congress and industry who say the project will cost too much and hamper economic recovery.

The study, never formally announced, has already become a controversy of its own.

Critics suspect EPA will overestimate the difficult-to-tabulate benefits of the ambitious ecosystem restoration -- a boost in water quality, elevated real estate values and improved tourism, fishing and recreational opportunities -- to justify the cleanup President Obama launched by executive order in May 2009.

"The valuation I've seen with natural resources in the past lead me to have the suspicion that sometimes they're overvalued," said Glynn Rountree, environmental policy analyst for the National Association of Homebuilders. The group filed suit last summer to block new EPA cleanup directives.

EPA's regional bay program office has previously estimated that the cost of the multi-year cleanup involving the 64,000-square-mile watershed's six states -- Delaware, Maryland, New York, Pennsylvania, Virginia and West Virginia, plus the District of Columbia -- could exceed \$30 billion.

Far trickier is calculating the benefits. Although the bay program office has been tasked with updating the costs side of the equation, EPA's environmental economics center in its Washington headquarters is charged with tabulating the benefits.

"It takes longer to do the benefits analysis than it does to do the costs," said EPA Chesapeake Bay program spokesman Tom Wenz. "We've been working very closely with the states, with academic experts, with national and regional economists in developing the analysis."

EPA officials hope to complete the study by the end of this year, although no firm deadline has been set.

"It's going to be a lengthy process because they want to make sure they don't put it out there until they've had a chance to cross-check it," Wenz said.

Work on the study began after House Agriculture Republicans in a hearing last year wrangled an admission from EPA Deputy Administrator Bob Perciasepe that the agency had done a poor job of presenting the costs and benefits of the project.

The program aims to compel states to crack down on farm fertilizer and urban sewage and stormwater pollution by enforcing reductions that will put the bay on a path to health by 2025.

"If I ask you how much it would cost to implement any of these particular things, you can't answer that question, and that is the main concern," said Rep. Bob Goodlatte (R-Va.), one of the program's chief critics, at the hearing (*E&E Daily*, March 17).

"On the other side of that coin is an oyster industry that is already lost. On the other side is a sport fishery that is worth several billion a year in economic value in the region," Perciasepe responded, before conceding the need for more accurate figures. "I don't disagree that we need to lay those out in clear form."

Earlier this week, the Chesapeake Bay Foundation attempted to frame the bay restoration debate in economic terms, publishing a report saying the restoration would create upward of 230,000 jobs (*Greenwire*, Jan. 3).

OIL AND GAS: EPA to test drinking water in Dimock, Pa.

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Spurred by complaints from residents, U.S. EPA has decided to run tests on drinking water in Dimock, Pa., the town made famous by the documentary "Gasland."

Natural gas giant Cabot Oil & Gas Corp., which last month ended a three-year run of water deliveries to the Pennsylvania village (*Greenwire*, Nov. 30, 2011), has agreed to postpone its drilling operations there as the agency conducts its tests.

"We will evaluate the sampling results and share them with the residents," Betsaida Alcantara, an EPA spokeswoman, wrote in an email yesterday. Residents provided EPA with some information about the water, but "there are gaps" in the data, she said.

The increased use of hydraulic fracturing, or fracking, has helped bolster the U.S. supply of natural gas, which is seen by many as the key to ending the nation's dependence on coal and foreign oil.

On the other hand, the drilling technique, which involves pumping chemical-laced fluid into underground shale formations to release trapped gas, has been blamed as the cause of tainted drinking water in Dimock and other gas-rich towns. A Dec. 8 EPA report on groundwater in west-central Wyoming was the first to find a link between fracking and chemically polluted water. Encana Corp., the gas company drilling in the studied area, said the agency erred in its report.

EPA is expected to complete its drinking water study by 2014 (*Bloomberg/Fuel Fix*, Jan. 6). -- PK

EVERGLADES: Fla. governor pledges support for restoration after years of fights

Published: Friday, January 6, 2012 http://adserver.eenews.net/www/delivery/ck.php?oaparams=2_bannerid=1231_zoneid=87_source=section_natural_resources_cb=3218f09256_oadest=http://www.nationalelectricityforum.org/

Capping off Tallahassee's recent push to resolve long-running legal and political battles over delayed and expensive plans to clean up the Florida Everglades, Gov. Rick Scott last night stood before an audience of some of his harshest critics and pledged his support to restoring the River of Grass.

"The Everglades are a national treasure, an economic engine, a job creator, and the future of Florida depends on its health," the Republican said during a keynote address opening the annual meeting of the Everglades Coalition, which represents local, state and national environmental organizations.

Scott's appearance was clearly intended to mend fences as he pushes a new strategy for cleaning up Everglades pollution. The governor has drawn criticism from environmentalists during his first year in office by gutting growth management laws, contesting federally imposed water quality standards and generally disdaining "job-killing" regulations.

But Scott and his staff have changed their tone recently, even holding behind-the-scenes talks with environmentalists on Everglades issues.

Kirk Fordham, CEO of the Everglades Foundation, said he believes Scott and his advisers have "turned a corner."

"They're very serious about spending a lot less time fighting in court and more time and resources on projects," he said.

Still, there is a considerable gap between Scott's plan and what federal officials and environmentalists say is needed.

After Scott flew to Washington in October to lay out his plan for them, Interior Secretary Ken Salazar, EPA Administrator Lisa Jackson and top officials from the U.S. Army Corps of Engineers and the Justice Department wrote the governor expressing their concerns.

The letter said Scott's plan calls for "significantly smaller" cleanup marshes than EPA has called for and would push back the deadline another two years to 2022. The officials also raised questions about the state's technical assumptions and whether the plan would "compromise achievement of water quality goals."

Alan Farago, president of Friends of the Everglades, which has filed a lawsuit on cleanup efforts, called the Scott administration's recent change of tone a "charm offensive" that falls short of what is ultimately needed to solve the Everglade's pollution problems.

"If we had a nickel for every politician in favor of saving the Everglades," he said, "we'd be flying private jets like the sugar barons" (Curtis Morgan, *Miami Herald*, Jan. 5). -- AS

WHITE HOUSE: Agencies ordered to write 'clear, simple' summaries of rule proposals

Emily Yehle, E&E reporter

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Many federal regulations will now come with "straightforward" summaries after White House regulatory czar Cass Sunstein directed agencies to preface complex rules with a short explanation on their need, legal basis and cost.

"The use of clear, simple executive summaries will make it far easier for members of the public to understand and to scrutinize proposed rules -- and thus help to improve them," Sunstein wrote in a blog [post](#) about the requirement today. "And for final rules, such summaries will make it far easier for people to understand what they are being asked to do."

The move is part of the White House's regulatory reform effort, in the wake of Republican criticism over the number and cost of federal rules. Earlier this year, President Obama initiated a governmentwide "look-back" aimed at streamlining rules and eliminating unnecessary regulations. So far, 30 agencies have proposed more than 500 reforms they claim will save billions of dollars.

The administration has also pledged to make the regulatory process more accessible to the public, and Sunstein directed agencies earlier this year to write documents in "plain language" free of jargon.

Providing executive summaries is the next step. The new summaries will include, among other things, summaries of a rule's major provisions and its costs and benefits.

In a memo to agencies this week, Sunstein asserted that Obama's order to ensure public participation in rulemaking cannot occur "if the requirements are unduly complex and if members of the public are unable to obtain a clear sense of the content of those requirements."

TOXICS: Mining industry tops EPA emission inventory

Manuel Quinones, E&E reporter

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Story updated at 2 p.m. EST on Jan. 7 to include comment from Earthworks.

Metal mining was the top source of toxic chemical emissions in the 2010 Toxics Release Inventory (TRI) report released yesterday by U.S. EPA.

Companies mining copper, gold, silver, lead and other metals accounted for roughly 40 percent of toxic releases for all industries, the report shows.

Overall, industries released 3.9 billion pounds of toxic chemicals nationwide in 2010, 16 percent more than in 2009. Toxic releases on land increased 28 percent and to waterways 9 percent over 2009, but air releases declined 6 percent.

"TRI is a cornerstone of EPA's community-right-to-know programs and has played a significant role in protecting people's health and the environment by providing communities with valuable information on toxic chemical releases," Administrator Lisa Jackson said in a statement.

The metals-mining sector also accounted for a 38 percent increase in production-related waste, despite declining industrial production, the report says. Changes in reporting and waste estimation may account for some variations, it says.

"The increase in production-related waste despite a downward trend in production suggests that factors other than production are having a greater impact increasing production-related waste than the decrease in production is having on decreasing production-related waste," the report says.

Metal mining's top spot in the inventory is likely linked to its large facilities and the large volume of materials it handles, the report says. Even a small change in the chemical composition of metal ore can significantly affect toxic releases.

Newmont Mining Corp., a business with major gold extraction operations in Nevada, was among the parent companies with the most toxic releases. Kennecott Utah Copper LLC was a major source of releases in that state. The TRI tracked 79 metals mining facilities.

In a response to the report, the National Mining Association said nearly all substances reported by mining operations occur naturally and "remain in low concentrations in the large amount of material handled and managed at specially designed on-site facilities permitted and regulated by state and federal laws."

The report is not intended to evaluate risk, the trade group cautioned. It also emphasized the industry's economic impact, saying U.S. metal mines added more than 4,000 jobs between June 2010 and June 2011.

"Due to increased demand for U.S. metals resulting from worldwide economic recovery that was most evident in 2010," the group said in a statement, "the volume of on-site land-managed materials reported by mining also increased over 2009."

The group Earthworks, which advocates for tighter controls on the mining industry, decried the U.S. District Court ruling that altered industry reporting requirements.

"Consequently, beginning with the 2002 reporting year, more than one third of the metal mining industry's toxics, which are still released into the environment every year, go unreported," the group said in a statement. "If included for the 2010 reporting year, the metal mining industry would have reported a whopping 2.1 billion pounds and accounted for almost half of all toxics reported in the United States."

Earthworks sees the report as evidence of how dirty metals mining can be. Coal mining, on the other hand, was 14th on the list of industries based on toxic releases.

"The Toxic Release Inventory once again shows why effective federal environmental oversight of resource extraction is necessary to protect communities and the environment," Earthworks said.

[Click here](#) to read the 2010 TRI national overview.

ClimateWire
TODAY'S EDITION: Monday, January 9, 2012 -- 08:10 AM [Read full edition](#)
1. CITIES:
Where the 'Live free or die' ethic is being tested by the sea

PORTSMOUTH, N.H. -- Driving past an undulating sea wall on New Hampshire's coast, Steve Miller pointed at the blue ocean and said the placid waters were deceptively calm. During winter storms now, the ocean gets busier than it has gotten in the past. Just across the road are miles of mansions with their manicured lawns and gazebos. Because of its high property values and the tourism dollars it attracts, the stretch is known as the Gold Coast. As the climate warms and the sea level rises, though, the Gold Coast could quickly become an expensive problem. [Go to story #1](#)

2. NEGOTIATIONS:
Can a new structure based on the notion of 'equity' replace the Kyoto pact?

U.S. diplomats returned from last month's global climate summit in Durban, South Africa, crowing that they had cracked the armor shielding China, India and other emerging nations from accepting binding emission cuts. But now a serious challenge awaits them: preparing for an entirely new climate change regime. [Go to story #2](#)

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